Advocate General: Opinion in dispute between France Télévisions and Playmédia

IRIS 2018-8:1/6

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Because France Télévisions is a public broadcasting body, its television channels are under a 'must-carry' obligation as provided for in Article 34-2 of France's Freedom of Communication Act. In addition to conventional terrestrial broadcasting, France Télévisions also offers the possibility of viewing its television channels via streaming on its Internet site. The company Playmédia operates an Internet site on which it offers, inter alia, the live streaming of a number of television channels, including those operated by France Télévisions. There is no charge for access to the site; Playmédia uses advertising to finance its activity. Having tried in vain to get France Télévisions to conclude a distribution contract, Playmédia had the company summoned to appear in court in order to achieve this, invoking the must-carry obligation incumbent on France Télévisions. France Télévisions entered counter-claims against Playmédia, based on violation of its intellectual property rights. At the same time as these legal proceedings were in hand, Playmédia referred the matter to the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) which, in May 2015, had issued formal notice to France Télévisions requiring it to stop opposing its services being relayed on the site in question. The public-sector group referred the notice to the Conseil d'État for cancellation, whereupon the Conseil d'État stayed its decision pending receipt of answers to several preliminary questions put to the Court of Justice of the European Union (CJEU).

In its referral, the Conseil d'État first asked the Court whether an undertaking that offers live streaming of television programmes online must be regarded as an undertaking providing an electronic communications network used for the distribution of radio or television broadcasts to the public within the meaning of Article 31(1) of Directive 2002/22/EC (the Universal Service Directive). Advocate General Szpunar said no, on the grounds that an undertaking that offers on-line viewing of television programmes supplies is not an electronic communications network but content directed at its users via such a network (in this case, the Internet). Such an undertaking was therefore not a supplier, but a user of such a network. The Advocate General noted that Playmédia had been wrong in asserting that it operated an electronic communications network.

Mr Szpunar went on to examine the compatibility of the must-carry and must-offer obligations (incumbent on television entities), to decide whether

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Directive 2002/22/EC, or any other provision of EU law, prevented a member state from imposing a must-carry obligation on undertakings not covered by Article 31 of the Directive which offer the live streaming of television programmes online, since the obligation is accompanied by the mutual obligation incumbent on the television entities concerned not to oppose such broadcasting. In passing, the Advocate General also noted that, while the Court was obviously not competent to interpret the domestic law of member states, Article 34-2 of France's Freedom of Communication Act appeared to demand the relay broadcasting of programmes broadcast terrestrially, whereas Playmédia was only offering a link to France Télévisions' Internet site. He also noted that copyright issues might constitute a hindrance to compliance with the must-carry obligation and that this ought to be taken into account when imposing and implementing the obligation. He also deemed that a must-carry obligation based on Internet links would not be legally viable. Thus, in response to the questions raised, the Advocate General stated that Directive 2002/22/EC did not prevent a member state from imposing an obligation to carry specific television programmes on undertakings offering live streaming of television programmes online. Such a requirement should nevertheless be made in the general interest, such as the maintenance, as part of the cultural policy of that member state, of diversity in the television programmes available in its territory, and not be disproportionate in relation to this objective. This implies that the way such an obligation is applied must be transparent, and based on criteria that are objective, non-discriminatory, and known in advance. The national authorities are responsible for checking that these conditions are met. Additionally, these undertakings must first obtain the agreement of the holders of copyright and neighbouring rights protecting the items contained in the said programmes. Lastly, in response to the final question, the Advocate General stated that a member state that imposes a must-carry obligation beyond the scope of the application of Article 31 of Directive 2002/22/EC is not bound by the conditions applicable to an obligation covered by the Article.

We now have to wait for the CJEU's decision before the Conseil d'État and the Court of Cassation will be able to move on to the next stage in this dispute.

Conclusions de l'avocat général M. Szpunar, affaire C-298/17, France Télévisions c/ Playmédia, présentées le 5 juillet 2018

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CC0298

Opinion of Advocate General Szpunar in Case no. C-298/17, France Télévisions S.A. v. Playmédia, delivered on 5 July 2018

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